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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HARDLINE ELECTRIC, INC., Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Republic Steel requires an employer to exhaust arbitral remedies under a collective bargaining agreement before seeking damages under 29 U.S.C. § 185 for a union's breach of contract.

2. Whether issuance of a Boys Markets injunction extinguishes an employer's right to damages under 29 U.S.C. § 185.

3. Whether the present suit constitutes enforcement of a prior arbitration award.

PARTIES

Hardline Electric, Inc.

International Brotherhood of Electrical Workers, Local 1547[1]

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[1]Only the union has been named as a respondent in this action. Prior to oral argument before the Ninth Circuit, the parties stipulated to the dismissal of all individual defendants other than Richard Warner. As to Mr. Warner, the Ninth Circuit reversed the District Court's award of $7,500.00 in costs against Mr. Warner for contempt of the preliminary injunction issued, and Hardline does not challenge that aspect of the Ninth Circuit's decision.

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Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of questions of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

U.S.C.A. § 1254

Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire

record to be sent up for decision of the entire matter in controversy.

Petitioner Hardline Electric, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 29, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, Hardline Electric, Inc. v. International Brotherhood of Electrical Workers, Local 1547, No. 80-3270, slip. op. at 2780 (9th Cir. June 29, 1982) appears as Appendix A hereto. The findings of fact and conclusions of law of the District Court appear as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 29, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves a dispute between a labor union, Local 1547 of the International Brotherhood of Electrical Workers ("the union") and an electrical contracting firm, Hardline Electric, Inc. ("Hardline"). Hardline is an employer and the union is a labor organization within the meaning of the Labor Management Relations Act of 1947, as amended. The union represents employees in an industry affecting commerce as defined under the Labor Management Relations Act of 1947, as amended. The union and Hardline were parties to a collective bargaining agreement which was in effect at all relevant times. Jurisdiction of the District Court of Alaska, the court of first instance, was invoked under 29 U.S.C. § 185.

The dispute concerned the issue of crew sizes on line construction jobs in

Alaska. Despite the fact that the "management rights" clause of the collective bargaining agreement gave the employer the right to determine crew sizes, the union insisted upon the right to define crew sizes. Work stoppages resulted over this issue, and Hardline brought the instant action in federal court in the District of Alaska. Hardline sought, inter alia, an injunction and damages under 29 U.S.C. § 185 as a result of the union's work stoppages. A Boys Markets injunction was issued, enjoining the union from conducting further strike activity. After trial on the damage action, the District Court of Alaska entered judgment awarding Hardline $329,768 for breach of contract.

The Ninth Circuit Court of Appeals reversed the judgment of the District Court of Alaska. The Ninth Circuit held that even though neither Hardline nor the union ever requested arbitration on the dispute

involved in this case, Hardline was limited to the remedy of arbitration. In discussing Hardline's obligation to seek arbitration, the court stated:

> Section 301 of the LMRA, 29 U.S.C. § 185, confers jurisdiction on the district court over suits by or against labor organizations to enforce the terms of a collective bargaining agreement. However, where the collective bargaining agreement provides for mandatory arbitration of some or all of the issues in the dispute, exhaustion of the contractual remedies is normally required. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965); see also Gateway Coal Co. v. UMW, 414 U.S. 368, 94 S.Ct. 629, 38 L.Ed.2d 583 (1974).

Appendix A-11; see also Appendix A-23, n. 3 ("Although parties to collective bargaining agreements are ordinarily held to their contractual agreement to arbitrate even absent a timely demand for arbitration, see Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965), . . .")

The Ninth Circuit rejected Hardline's argument that its action for damages was proper because the union waived its right to arbitration by not requesting it. The specific holding of the Ninth Circuit on this point, with which Hardline disagrees, is as follows:

> We next consider Hardline's contention that the Union waived its contractual right to arbitration by not moving for a stay pending arbitration early in the suit. We see no place for the doctrine of waiver on the facts of this case. Hardline sought and obtained an injunction against the Union's alleged strike activity on the basis that the dispute was arbitrable. The Norris-La Guardia Act, 29 U.S.C. §§ 101-115, denies federal courts jurisdiction to enter any injunction "in a case involving or growing out of a labor dispute," 29 U.S.C. § 101, except in certain narrowly defined circumstances, none of which apply to the present case. A court may, however, enjoin a strike pending arbitration when the issue underlying the strike is subject to mandatory grievance-and-arbitration provisions of a collective bargaining agreement. Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970). If the underlying dispute is not subject

to mandatory arbitration, no injunction may be entered. Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 96 S.Ct 3141, 49 L.Ed.2d 1022 (1976). The reason for this judicially-created exception is that the federal policy favoring arbitration could not be meaningfully advanced if parties were free to strike over arbitrable issues.

The injunction issued by the district court in this case recites the necessary finding that the dispute is arbitrable and enjoins the strike on that basis, citing Boys Markets. The parties were not ordered to arbitrate, however, and Hardline apparently did not attempt to pursue its grievance through arbitration. Hardline's president testified at trial that a grievance "might have been filed," but that no further action was taken.

Under these circumstances, Hardline is estopped to argue that the Union waived its right to arbitrate. Hardline invoked the jurisdiction of the federal court on the strength of its assertion that the dispute was arbitrable. It then did not even attempt to arbitrate, but took the matter directly to trial. It would vitiate the Norris-La Guardia Act, and condone an abuse of the federal courts, to allow Hardline to proceed with its damages action without first exhausting its arbitral remedies. The judgment for damages against the Union must therefore be reversed.

(Footnotes omitted.) Appendix A-14-17.

The Ninth Circuit also rejected Hardline's argument that it had a right to damages because it was enforcing a prior arbitration award. See Appendix A-12-14.

REASONS FOR GRANTING THE WRIT

1. AN EMPLOYER IS NOT REQUIRED TO EXHAUST ARBITRAL REMEDIES BEFORE SEEKING DAMAGES UNDER 29 U.S.C. § 185.

The Ninth Circuit in this case cited Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) for the proposition that an employer is required to exhaust its arbitral remedies under the collective bargaining agreement before seeking damages under 29 U.S.C. § 185 for the union's breach of contract. See Appendix A-23, n. 3. However, in applying the exhaustion of arbitral remedy principal contained in Republic Steel in this case, the Ninth Circuit demonstrated a fundamental misunderstanding of Republic Steel.

Republic Steel is inapposite here because it dealt exclusively with an individual union member's duty to attempt to use the contract grievance procedure agreed upon by the union and the employer as the mode of redress. Republic Steel merely holds that a union member may not circumvent a mandatory grievance procedure -- it does not require exhaustion of arbitral remedies as between the parties to the contract, the union and the employer.

On the contrary, it is clear that although the existence of a mandatory grievance procedure is an affirmative defense to an action for damages under 29 U.S.C. § 185, the right to arbitration is a contract right which, like any other contract right, may be waived. See Reid Burton Construction, Inc. v. Carpenters District Council of Southern Colorado, 614 F.2d 698, 702 (10th Cir. 1980), cert. denied, 101 S.Ct. 85 (1980); Cornell &

Company, Inc. v. Barber & Ross Company, 360 F.2d 512, 513 (D.C. Cir. 1966); Morales Rivera v. Sea Land of Puerto Rico, Inc., 418 F.2d 725, 726 (1969); Burton-Dixie Corporation v. Timothy McCarthy Construction Company, Inc., 436 F.2d 405, 407 (5th Cir. 1971. See also Drake Bakeries v. Local 50, American Bakery Workers, 370 U.S. 254, 266-67 (1962) (the court's discussion of the waiver issue makes clear that had the union not timely requested arbitration, as was the situation in this case, its right to arbitration would have been waived and the employer's court action for damages would have been proper).

The possibility that one party may waive its contractual right to arbitration is fundamentally inconsistent with the Ninth Circuit's position that the other party must exhaust its remedy under the collective bargaining agreement. Indeed, it would be patently unfair in this case to

allow the union, which never asserted its right to arbitration and which lost at trial, to then go forward in arbitration for a second chance. Thus, while arbitration is the preferred method for resolution of labor disputes, such preference does not have the effect of completely obliterating both parties' right to seek damages under 29 U.S.C. § 185.

2. AN EMPLOYER'S ACTION FOR DAMAGES UNDER 29 U.S.C. § 185 IS NOT EXTINGUISHED BY THE ISSUANCE OF A BOYS MARKETS INJUNCTION.

Together Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970) and Buffalo Forge v. United Steelworkers, 428 U.S. 397 (1976) stand for the proposition that, where the underlying dispute is arbitrable, an employer may obtain an injunction to prevent the union's breach of a no-strike provision of a collective bargaining agreement. Boys Markets held

that such an injunction did not violate the anti-injunction provisions of the Norris La-Guardia Act. However, neither Boys Markets nor later cases which interpret it nor any policy of labor law support the Ninth Circuit's position in this case, i.e., that an employer, once having obtained a Boys Markets injunction, is then barred from seeking damages in court and is limited to arbitration as its remedy. In fact, just the opposite is true: "Moreover, the court's injunction in such cases does not require the union to arbitrate but only that it refrain from striking and also requires that the employer arbitrate only if and when the union chooses to pursue that remedy." (emphasis added). Gorman, Basic Text on Labor Law, Unionization and Collective Bargaining (1976) at 610. Therefore, contrary to the Ninth Circuit's position, the issuance of a Boys Markets injunction

neither requires an employer to arbitrate a dispute nor to exhaust its remedies under the collective bargaining agreement before seeking damages under 29 U.S.C. § 185.

3. HARDLINE'S SUIT FOR DAMAGES WAS PROPER BECAUSE HARDLINE SOUGHT ENFORCEMENT OF A PRIOR ARBITRATION AWARD.

Hardline also contended that it had a right to obtain damages in court because its action constituted enforcement of a prior arbitration award regarding the crew size issue. See San Francisco Electrical Contractor's Ass'n., Inc. v. International Brotherhood of Electrical Workers, Local 6, 577 F.2d 509 (9th Cir. 1978). Despite the fact that the union repeatedly admitted the applicability and binding nature of the prior award on the present dispute, and without any factual support in the record, the Ninth Circuit erroneously held that the

prior arbitration award involved different facts and was therefore inapplicable.

4. THIS CASE PRESENTS IMPORTANT ISSUES OF LABOR LAW WHICH REQUIRE THE DECISION OF THIS COURT.

This Court should grant the present petition in order to interpret two seminal cases in the area of labor law, Boys Markets and Republic Steel. The Ninth Circuit's erroneous application of these two cases has created a fundamental and radical departure from the established principles of labor law which govern all employers and unions involved in labor disputes. This Court's reversal of the Ninth Circuit's decision is necessary in order to prevent the decision from having the widespread precedential effect which it otherwise would have.

The Ninth Circuit held that Hardline could not seek damages under 29 U.S.C. § 185 because it had obtained a Boys

Markets injunction earlier in the case. The Ninth Circuit's decision was not based on the particular facts of this case, but rather was based on the principle that whenever any employer obtains a Boys Markets injunction, the right to seek damages in court for the union's breach of the collective bargaining agreement is extinguished. Indeed, under the Ninth Circuit's decision, arbitration would be required even if both parties desired to forego arbitration and instead proceed in court.

The Supreme Court should grant the present petition for certiorari in order to clarify that the consequences of a Boys Markets injunction are not those stated by the Ninth Circuit. The instant case will have an impact which is both widespread and fundamental in the area of labor law because of the number of Boys Markets injunctions issued and because of the

"absolute" nature of the rule enunciated by Ninth Circuit.

Additionally, the present petition should be granted in order to correct the Ninth Circuit's erroneous extension of the Republic Steel doctrine, which was limited to exhaustion of the arbitral process by individual union members, to disputes between unions and employers. This Court's decision on such an extension and indeed, perversion, of Republic Steel is required because of the importance of the case in the field of labor law and because the issue of the right to seek damages versus arbitration for breach of a collective bargaining agreement is a fundamental and often recurring issue in labor law.

5. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS REGARDING THE ISSUES OF EXHAUSTION OF ARBITRAL REMEDIES AND WAIVER.

The Ninth Circuit's decision in this case creates a conflict among the circuit court of appeals because the Ninth Circuit stands alone in requiring the parties to a collective bargaining agreement to exhaust their remedies under the agreement before filing suit under 29 U.S.C. § 185. No other court of appeals has interpreted Republic Steel as requiring such a result. On the contrary, nearly all other courts of appeals and all those which have considered the issue have held that the contract right to arbitration may be waived. See Morales Rivera v. Sea Land of Puerto Rico, 418 F.2d 725 (1st Cir. 1969); Demsey & Associates v. S.S. Sea Star, 461 F.2d 1009 (2d Cir. 1972); Radiator Specialty Co. v. Cannon

Mills, 97 F.2d 318 (4th Cir. 1938); Burton-Dixie Corp. v. Timothy McCarthy Construction Company, Inc., 436 F.2d 405 (5th Cir. 1971); American Locomotive Co. v. Gyro Process Co., 185 F.2d 316 (6th Cir. 1950); E. T. Simonds Construction Company v. Local 1330 of Int. Hod Carriers, 315 F.2d 291 (7th Cir. 1963); Local 198, United Rubber, Cork, Linoleum & Plastic Workers of America v. Interco, Inc., 415 F.2d 1208 (8th Cir. 1969); Reid Burton Construction, Inc. v. Carpenters District Council of Southern Colorado, 614 F.2d 698 (10th Cir. 1980), cert. denied, 449 U.S. 824 (1980); Cornell & Company, Inc. v. Barber & Ross Company, 360 F.2d 512 (D.C. Cir. 1966).

The possibility that one party may waive its right to arbitration is patently inconsistent with the notion that the other party must exhaust its arbitral remedies. Therefore, the Ninth Circuit's decision in this case creates a conflict among the

circuit court of appeals which requires a decision of this Court settling the issue.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,
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September 23, 1982